Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 132, Original

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary and Second Reports of the Special Master

BRIEF IN SURREPLY TO NORTH CAROLINA'S REPLY

TROY KING
ATTORNEY GENERAL
ALABAMA
BILL MCCOLLUM
ATTORNEY GENERAL
FLORIDA
ROBERT E. COOPER JR.
ATTORNEY GENERAL
TENNESSEE
WILLIAM C. MIMS
ATTORNEY GENERAL
VIRGINIA

Counsel for Plaintiffs

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

September 9, 2009

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, N.C. 27605
(919) 828-2501

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THIS COURT SHOULD ENFORCE THE SANCTIONS AGAINST NORTH CAROLINA	2
A. The Compact Provides For Sanctions, Including Monetary Sanctions	2
B. A Party May Not Escape Sanctions By Withdrawing From The Compact	10
II. NORTH CAROLINA BREACHED THE COMPACT	13
A. The Commission's Determination Of Breach Is Conclusive Or, Alternatively, Entitled To Deference	13
B. North Carolina Breached The Compact	19
1. Breach By Non-Performance And Repudiation	19
2. Breach By Bad-Faith Withdrawal	24
III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES Page

Aventis Envtl. Sci. USA LP v. *Scotts Co.*, 383 F. Supp. 2d 488 (S.D.N.Y. 2005) 25
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 5
Bebee v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283 (D.C. Cir. 1997) 25
Chem. Bank v. *Paul*, 614 N.E.2d 436 (Ill. App. Ct. 1993) 25
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 10
Commercial Ins. Co. of Newark, N.J. v. *Gonzalez*, 512 F.2d 1307 (1st Cir. 1975) 20
Cooper Distrib. Co. v. *Amana Refrigeration, Inc.*, 63 F.3d 262 (3d Cir. 1995) 20
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 9
Ebasco Servs., Inc. v. *United States*, 37 Fed. Cl. 370 (1997) 25
Garfield & Co. v. *Wiest*, 432 F.2d 849 (2d Cir. 1970) 18
Grid Radio v. *FCC*, 278 F.3d 1314 (D.C. Cir. 2002) 18
Kansas v. *Colorado*, 533 U.S. 1 (2001) 25
Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. *NLRB*, 501 U.S. 190 (1991) 11
Mobil Oil Exploration & Producing Se., Inc. v. *United States*, 530 U.S. 604 (2000) 27
Old Town Trolley Tours of Wash., Inc. v. *Wash. Metro. Area Transit Comm'n*, 129 F.3d 201 (D.C. Cir. 1997) 17, 18
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 7

TABLE OF AUTHORITIES – continued

Page

Russello v. *United States*, 464 U.S. 16 (1983) 5

Sheet Metal Workers Int'l Ass'n v. *Jason Mfg., Inc.*, 900 F.2d 1392 (9th Cir. 1990) .. 18

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 15

Texas v. *New Mexico*, 462 U.S. 554 (1983) 13, 14, 17

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 17

U.S. Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 3, 4

STATUTES AND REGULATIONS

Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 224, 99 Stat. 1880 (1986) 12

Midwest Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 225, 99 Stat. 1892 (1986) 12

Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 223, 99 Stat. 1871 (1986) ..... *passim*

Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 226, 99 Stat. 1902 (1986) 6

Northeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, tit. II, § 227, 99 Stat. 1909 (1986) 6, 7

TABLE OF AUTHORITIES – continued

	Page
28 U.S.C. § 1491	10
N.C. Gen. Stat. § 104G-4	23
10 C.F.R. § 61.10	20
§§ 61.11-.16	20

SCHOLARLY AUTHORITIES

9 Arthur Linton Corbin, *Corbin on Contracts* (Interim ed. 2002)	27
12 Arthur Linton Corbin, *Corbin on Contracts* (Interim ed. 2002)	27
13 Sarah H. Jenkins, *Corbin on Contracts* (rev. ed. 2003)	11
11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* (4th ed. 1999)	22

OTHER AUTHORITIES

Distribution of Barnwell Disposal Revenues, Fiscal Year 2008, http://www.energy.sc.gov/publications/Revenue%20Distribution%20FY2008.pdf	1
Restatement (Second) of Contracts (1981)	23, 24, 26
Restatement (Third) of Agency (2006)	28
U.C.C. § 2-106(3)	11

INTRODUCTION

North Carolina accepted $80 million from the Plaintiff States via the Southeast Compact Commission to build a low-level radioactive waste disposal facility. North Carolina did not build the facility or give the money back. Instead, it took the Plaintiffs' money for nearly 11 years and then withdrew from the Compact. This left the Plaintiffs with nothing to show for their investments of time and money, and gave North Carolina an $80 million head-start toward constructing its own lucrative facility should it choose to do so.[1] North Carolina argues that it can retain this windfall and escape responsibility to its sister States and the Southeast Compact Commission. It is wrong for three reasons.

First, the Compact authorizes the Commission to remedy this grossly unfair behavior. It grants the Commission the power to impose monetary sanctions. Indeed, the Compact anticipated North Carolina's specific maneuver by making clear that a party State in breach of the Compact retains its obligations to its Compact partners even if it withdraws on the eve of a sanctions hearing. The Court should uphold the Commission's sanctions authority.

Second, the Compact's text explicitly makes the Commission "the judge" of the party States' "compliance with the conditions and requirements of this compact." Art. 7(C). The Commission exercised this authority and found breach. Independent of the Commission's sanctions determination, this Court

---

[1] South Carolina's facility collected over $47 million in fees in 2008 alone. Distribution of Barnwell Disposal Revenues, Fiscal Year 2008, http://www.energy.sc.gov/publications/Revenue%20Distribution%20FY2008.pdf.

should affirm the Commission's determination that North Carolina breached the Compact.

Third, the Commission's judgment of breach is confirmed by the application of normal contract law principles. North Carolina has admitted that after December 1997, it took no steps to license a facility, breaching its contractual duty to take "appropriate steps" to do so. Furthermore, North Carolina explicitly repudiated its Compact duties. Finally, North Carolina breached its duty of good faith when, after taking $80 million from the party States, it walked away, leaving those States with nothing.

For each of these reasons, the Court should hold North Carolina liable for its conduct as a matter of law.

I. THIS COURT SHOULD ENFORCE THE SANCTIONS AGAINST NORTH CAROLINA.

The Compact provides that the Commission may sanction North Carolina for the breach of its duties under the Compact. North Carolina may not avoid this sanction by withdrawing from the Compact on the eve of the sanctions hearing.

A. The Compact Provides For Sanctions, Including Monetary Sanctions.

The Compact states:

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, *including* suspension of its rights under this compact and revocation of its status as a party state.

Art. 7(F) (emphasis added).

North Carolina argues that the Compact authorizes the Commission to punish breaches only by denying a "'State the benefits of Compact membership,'" Def. Reply 4, *i.e.*, by "suspension of its rights under this compact and revocation of its status as a party state." Art. 7(F). Put differently, North Carolina argues that "including" means "limited to," and consequently, it cannot be punished for its actions.[2] Cf. US Br. 22 ("plaintiffs are correct that 'include' is not a term of limitation").

North Carolina cites *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992), for the proposition that "the term 'sanction' does *not* always mean any penalty or coercive measure, but must be interpreted according to its context." Def. Reply 12. But, Plaintiffs are not arguing that the Compact authorizes any conceivable sanction, including imprisonment. *Id.* 11. Instead, Plaintiffs contend that in this context, the clause authorizes them to get their money back.

North Carolina's argument thus rests on the counter intuitive proposition that "sanctions" as used in the Compact does not encompass monetary sanctions. North Carolina's suggestion that *Ohio* supports that proposition is wrong. That decision *as-*

---

[2] The Special Master concluded that North Carolina did not waive its right to contest the legality of the sanctions hearing by refusing to participate. Preliminary Report 32-33. North Carolina and the United States erroneously suggest that Plaintiffs abandoned their third exception challenging this conclusion. *See* Def. Reply 4 n.1 (citing Preliminary Report 32-33); US Br. 20 n.6. Plaintiffs' opening brief recited this exception, which requires no argument beyond stating that North Carolina "refused to participate" in the sanctions hearing, *see* Pls.' Exceptions 17, and therefore that it forfeited the right to contest the sanction imposed.

sumed that the term "sanction" included coercive monetary fines – the most reasonable way to interpret that word. *Ohio*, 503 U.S. at 621-23, 625.

North Carolina's interpretation would make most of Article 7(F) meaningless. The Compact could simply have authorized the Commission to suspend a party State's rights or revoke its status, and there would have been no need for the general sanctions authorization. A reading that makes part of the statute superfluous must be rejected. See, *e.g.*, Def. Reply 10 (quoting *FCC* v. *Nextwave Pers. Commc'n, Inc.*, 537 U.S. 293, 302 (2003)). Moreover, the Compact's drafters had numerous ways to indicate that the two remedies listed were exclusive (*e.g.*, by using the words "by" or "limited to," rather than "including"). They did not, and their choice should be given effect.

When the term "sanctions" is given its normal meaning – which encompasses, at a minimum, coercive or punitive monetary penalties, *Ohio*, 503 U.S. at 621-23 – the specification of suspension and revocation serves an important purpose. It indicates what penalties are available apart from, and more severe than, normal monetary penalties. Thus, the sanctions provision is analogous to a contract clause providing for specific performance in limited circumstances; it lists the remedies that the Commission may seek beyond the usual monetary recourse.

North Carolina also offers a grab-bag of unconvincing arguments to ignore the text of Article 7(F).

1. The first several arguments depend on "discerning" the meaning of the Southeast Compact by comparing it to compacts drafted by separate parties although the respective compact authors had no meaningful interaction during the drafting process. North Carolina relies on the proposition articulated

in *Russello* v. *United States* that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 464 U.S. 16, 23 (1983) (quotation marks omitted).

That rule does not apply here. Congress did not draft the Compacts. They were separately drafted by the individual sets of party States through negotiation and were approved by Congress without amendment. Their appearance together in a federal law is the result solely of the fact that these individual groups of States acted pursuant to the same Congressional authorization. As the other compact commissions explain, "[t]he language of the individual compacts may have been approved by Congress contemporaneously, but they were drafted and enacted by state legislatures independently and considered separately by Congress over the course of several years." Br. of Rocky Mountain Board 11. As a result, the compacts vary substantially in their detail and structure, and no interpretive guidance is gained by parsing their differences.

This Court does "not read the enumeration of one [provision] to exclude another *unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.*" *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (emphasis added). There must be some association "justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Id.* *Russello*'s general presumption does not apply here. Neither North Carolina nor the United States explains why Congress would have intended some compacts to be enforceable by monetary sanctions while others were

not. The Southeast Compact's reference to "sanction" should be understood to carry its ordinary meaning that embraces monetary penalties.

In all events, a comparison of the differences among the compacts does not support North Carolina's argument. For instance, North Carolina argues that in light of the express reference to monetary sanctions in other compacts, the omission of such a reference in the Southeast Compact indicates that such sanctions may not be awarded. Def. Reply 6-7. But, the Southeast Compact and the Northeast Compact are the only compacts that generally authorize "sanctions." Northeast Interstate Low-Level Radioactive Waste Management Compact "Northeast Compact," Pub. L. No. 99-240, tit. II, § 227, Art. IV(i)(14), 99 Stat. 1909, 1915 (1986). The Rocky Mountain Compact, for example, specifically authorizes only exclusion and contains no general sanctions authority. Rocky Mountain Interstate Low-Level Radioactive Waste Management Compact "Rocky Mountain Compact," Pub. L. No. 99-240, tit. II, § 226, Art. VIII(e), 99 Stat. 1902, 1909 (1986). Applying North Carolina's rule of construction, the Southeast Compact – which confers the specific authority to exclude *and* general sanctions authority – must give the Commission sanctions power *beyond* exclusion.[3]

In addition, among the seven low-level radioactive waste compacts ratified in 1985, the term "sanctions" is used only twice in the context of compelling unwill-

---

[3] The United States agrees with Plaintiffs that the Southeast Compact must "authorize sanctions other than exclusion," but does not suggest what non-exclusionary sanctions the Compact authorizes if not monetary sanctions. See US Br. 27 n.8 & 22. Neither the United States nor North Carolina suggests any plausible purpose for the Compact's general authorization of sanctions other than authorizing monetary sanctions.

ing party States to act – the Southeast and Northeast Compacts. If one follows North Carolina's interpretive principles, then "sanctions" must have the same meaning each time it appears. *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The Northeast Compact defines "sanctions" as "fines, suspension of privileges and revocation of the membership of a party state". Northeast Compact, Art. IV(i)(14). Thus, "sanctions" in the Southeast Compact should be read to include these elements.

As these comparisons reveal, comparisons to other compacts are not helpful. The term sanction should be given its normal meaning.

2. North Carolina fails to deal coherently with the portion of the Compact's sanction provision that provides: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). Because this sentence requires party States to retain their obligations under the Compact until the effective date of the sanction imposed, it necessarily contemplates a sanction that *can* be imposed on a party that has withdrawn from the Compact – *i.e.*, a monetary sanction.

North Carolina suggests that this provision only applies to *current* party States. Def. Reply 12-13. But the Compact does not limit Article 7(F) to current party States. Instead, it applies to any state "declared a party state to the compact," as North Carolina clearly has been.

3. North Carolina mysteriously claims that a "monetary penalty ... has nothing to do with the party States' Compact rights and obligations." *Id.* 13. The United States makes the similar assertion that a

monetary sanction would not "have any impact on an offending State's 'rights and obligations' under the Compact." US Br. 24. But a monetary penalty *is* an obligation, incurred due to the breach of a Compact obligation. And both North Carolina and the United States recognize this point elsewhere in their briefs. See Def. Reply 22 (incorrectly arguing that when it "resigned from the Compact, it had *no* monetary *obligations*," *i.e.*, no pending monetary penalty) (second emphasis added); US Br. 30 n.9 ("Were the Compact construed to permit the Commission to order North Carolina to return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that *obligation* by exercising a unilateral right to withdraw.") (emphasis added).

4. North Carolina's further argument that revocation is an adequate punishment for all Compact breaches is disingenuous. As North Carolina's conduct indicates, a designated host State cannot be effectively punished for breach *except* by monetary sanctions. North Carolina asserts that by withdrawing it has "'imposed upon itself the most severe sanction available.'" Def. Reply 23. But, North Carolina was rewarded for its breach with an $80 million head-start toward constructing a facility. The notion that North Carolina punished itself by *voluntarily* withdrawing from the Compact is ridiculous.

5. North Carolina implies that the Commission has only the powers listed in Article 4(E). *Id.* 3-6 (arguing that 4(E) sets out all of the Commission's powers and other sections provide only the mechanisms for using those powers). This contradicts the Compact's plain text. Article 7 establishes many separate powers wielded by the Commission that are not mentioned in Article 4(E). For example, Article 7(D) states:

> The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article 4(H)(1), shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission; shall cause legislation to be introduced in the Congress which grants the consent of Congress to this compact, and shall do those things necessary to organize the Commission and implement the provisions of this compact.

Article 7 independently confers powers on the Commission not set out in Article 4.

Regardless, a contextual examination of Article 4(E) supports Plaintiffs' position, not North Carolina's. By that provision, the Commission is empowered "to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility." Art. 4(E)(7). If Article 7(F)'s separate provision generally authorizing "sanctions" is to be given some effect, then "sanctions" must mean something more than suspension. of rights or revocation of Compact membership. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-77 (2003) (requiring statutory construction that does not "render a statutory term superfluous"). See *supra* at 4.

6. Finally, both North Carolina and the United States argue for a clear-statement rule – that is, all ambiguity must be construed against a party enforcing a sanctions award. US Br. 24-26; Def. Reply 14 n.2, 40. The United States asserts that this rule would "encourag[e] States to resolve their differences and address issues of multistate and national concern through mutual agreement." US Br. 25.

But a rule that generally interprets compacts to immunize breaching parties from punishment will discourage states from using compacts. Indeed, the purpose of the Tucker Act, 28 U.S.C. § 1491, which waives the United States' sovereign immunity against suits by contracting parties, is to reassure the United States' contract partners that it cannot breach its contracts with impunity. See also Br. of Rocky Mountain Board 17-18 ("When a compact state, such as North Carolina, feels free to disregard its obligations to other compact states, the very foundation of the compact system is eroded."). When this Court interprets a contract under the Tucker Act, it does not place a thumb on the interpretive scale for the United States. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."). Rendering compacts unenforceable will discourage their use.

B. A Party May Not Escape Sanctions By Withdrawing From The Compact.

As noted, Article 7(F) concludes: "Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." This text makes clear that a party cannot escape sanctions by withdrawing.

North Carolina responds by arguing that if one followed the literal text of Article 7(F) "the Commission could impose sanctions on a former party State at *any time* in the future, so long as the ostensible 'hook' for the sanctions is conduct that occurred during the State's membership in the Compact." Def. Reply 19. But, established doctrines such as laches would prevent any unreasonable delays.

North Carolina, moreover, cannot rely on those doctrines here. On June 21, 1999, Florida and Tennessee filed a Sanctions Complaint against North Carolina. Realizing that the Commission would not continue to provide it with funds, North Carolina withdrew from the Compact on July 26, 1999. The Commission called a hearing, according to its Sanctions Procedure, and declared North Carolina in breach, ordering sanctions on December 8, 1999, which North Carolina declined to pay. On July 10, 2000 the Commission filed an original action. The Commission has acted promptly at each juncture.

Next, North Carolina asserts that when it "resigned from the Compact, it had *no* monetary obligations that were already 'due and owing' or 'accrued.'" Def. Reply 22. But under settled contract law, a party incurs an obligation at the moment it breaches a contract. That obligation persists until satisfied regardless of whether a party has exercised its power to withdraw from a contract. See U.C.C. § 2-106(3) ("On 'termination' ... any right based on prior breach or performance survives."); *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc.* v. *NLRB*, 501 U.S. 190, 206 (1991) ("an expired contract has by its own terms released all its parties from their respective contractual obligations, *except obligations already fixed under the contract* but as yet unsatisfied") (emphasis added); 13 Sarah H. Jenkins, *Corbin on Contracts* § 68.9 (rev. ed. 2003) ("[T]he exercise of the power to terminate will not discharge the duty to pay damages for a prior breach of the agreement.").

North Carolina again asks this Court to interpret the Southeast Compact by referring to the text of other compacts. Def. Reply 16-17. It notes that the Midwest and Central Midwest Compacts generally require five years' advance notice for withdrawal,

failing to mention that both Compacts allow a designated host state to withdraw, with immediate effect and *no liability*, within 90 days of its designation. See Central Midwest Compact, Pub. L. No. 99-240, tit. II, § 224, Art. VIII(d)&(f), 99 Stat. 1880, 1891 (1986); Midwest Compact, Pub. L. No. 99-240, tit. II, § 225, Art. VIII(e)&(i), 99 Stat. 1892, 1900-01 (1986). The Southeast Compact contains no provision expressly allowing a host state to withdraw *without liability*. If these differences between compacts were significant, then the Southeast Compact's lack of such a provision would be a sign that host States may not withdraw without retaining extant obligations.

North Carolina also states that "[u]nlike the Southeast Compact, other compacts expressly authorize the imposition of sanctions on a former State for conduct occurring while it was a member." Def. Reply 16-17 (citing Central Midwest Compact, Midwest Compact, and Northeast Compact)). But, as noted, the Compact's penalty provision specifies that obligations continue "until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." Art. 7(F). A monetary obligation includes a penalty accrued. Def. Reply 22. Thus, as the United States has argued, if North Carolina may be ordered to "return the funds it received during its Compact membership, North Carolina should not be allowed to avoid that obligation by exercising a unilateral right to withdraw." US Br. 30 n.9.

II. NORTH CAROLINA BREACHED THE COMPACT.

A. The Commission's Determination Of Breach Is Conclusive Or, Alternatively, Entitled To Deference.

The Southeast Compact's text states that the Commission "is the judge" of the parties' "compliance with the conditions and requirements of this compact." Art. 7(C). North Carolina, however, claims, without supporting citation, that this Court "must decide for itself whether North Carolina breached its Compact obligations" and that "[t]he requirement of full, non-deferential review by the Court follows from both the subject matter of the action (i.e., an interstate compact) and the nature of the Court's original jurisdiction." Def. Reply 25, 26.

North Carolina claims that *Texas* v. *New Mexico*, 462 U.S. 554 (1983), demonstrates that a compact cannot designate any adjudicator of breach other than a court. The decision, however, supports Plaintiffs' argument. There the Pecos River Compact was governed by a Commission, composed of one commissioner from each compacting state (Texas and New Mexico) and a non-voting commissioner representing the United States. *Id.* at 560. A dispute developed; and, because any action had to be approved by both voting commissioners, the commission was stalemated. In a subsequent original case, the special master proposed that either the United States' representative or some other third party break the tie. *Id.* at 562-64. This Court rejected that solution, stating that the compact did not provide for a third voting member, and that "no court may order relief inconsistent with [the compact's] express terms." *Id.* at 564-66.

This case does not support North Carolina's position – that the courts must decide every dispute among compacting states, even if the compact states agreed otherwise. Indeed, its focus on the compact text strongly suggests that when a compact expressly provides for another arbiter, this Court will enforce that provision. Relevant here, this Court noted, "[i]f it were clear that the Pecos River Commission was intended to be the exclusive forum for disputes between the States, then [the Court] would withdraw." *Id.* at 569. The Southeast Compact makes the Commission "the judge" of party States' compliance with the Compact, and this Court should enforce that term and uphold the Commission's determination of breach.

North Carolina next claims that if the Commission is empowered to judge anything, it is only a party State's qualifications to join the Compact, not its "'duties'" or "'obligations'" under the Compact. See Def. Reply 28-29; see also US Br. 29-30. This argument is perplexing. The Compact provides that the Commission "is the judge of the qualifications of the party states and of its members *and of their compliance with the conditions and requirements of this compact.*" Art. 7(C) (emphasis added). The provision could be limited to a determination of a state's "eligibility to become a 'party state' within the meaning of the Compact," Def. Reply 28, only by deleting the italicized phrase.[4]

---

[4] North Carolina's limiting construction is further undermined by the first clause of Article 7(C) which delineates two groups: the "state eligible" and the "party state." The clause of Article 7(C) addressed above expressly applies to "party states," *i.e.*, those admitted to the Compact, not to "eligible" states.

Even more absurd is North Carolina's assertion that Article 7(C) applies only to "'conditions'" and "'requirements'" and that these terms do not include "'duties' or 'obligations' under the Compact." Def. Reply 29. The question whether a Compact party has fulfilled its "duties" or "obligations" is not materially different from the question whether that party has fulfilled the "requirements" and "conditions" of the Compact.

North Carolina also complains that the Commission's procedure for determining whether North Carolina breached the Compact was deficient because the Commission did not use the process set out in Article 7(F). See Def. Reply 28. As previously noted, however, Article 7(F) governs the Commission's imposition of sanctions, not its determinations of breach. Moreover, Article 7(F) states only that "[a]ny sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members." North Carolina has cited nothing that shows that the Commission did not fulfill this requirement. Indeed, before the Commission sent the two letters notifying North Carolina that it was in breach, the Commission discussed and voted on North Carolina's refusal to perform at numerous meetings. Moreover, in December 1999, after a full hearing, the Commission again – by unanimous vote – found North Carolina in breach and imposed sanctions. Undisputed Facts ¶ 64; Dec. 9, 1999 Sanctions Res. (App. 412). The Compact requires nothing more.[5]

---

[5] Any North Carolina claim that it was entitled to Due Process, including an "adjudicative process, hearings, testimony, or examinations," Def. Reply 28, is wrong. The Fifth Amendment does not apply to States, *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). Moreover, North Carolina declined to

Further, the determinations of breach followed extensive deliberations and several Commission votes. The first determination, reflected in a January 12, 1998 letter from the Commission to North Carolina, see Hodes letter to Corgan (Joint Supp. Fact Br. App. 55), was sent after numerous Commission requests that North Carolina accept a proposed Memorandum of Understanding ("MOU") on project financing or provide an alternative funding mechanism. This has been fully set out in previous briefing. See Pls. Exceptions 10-12.

In fact, the Commission's first determination of breach came only *after* North Carolina informed the Commission that unless it funded the project, North Carolina would "commence the orderly shutdown of the project." Dec. 19, 1997 Corgan letter to Hodes (App. 319). This is a definitive declaration of intent to breach; if there were any procedural error here – and there was not – it was harmless.

The Commission's second determination that North Carolina was in breach of the Compact was made at the Commission's April 21, 1999 meeting. This determination followed a status report of the Monitoring and Policy and Planning Committees indicating that North Carolina had taken no steps in the licensing process. See Apr. 21, 1999 Minutes of Commission (App. 324). As a result, the Committees submitted a resolution to the Commission, adopted by over two-thirds of the Commissioners, finding that North Carolina was "in violation of the [Compact]" due to its failure "to proceed with the process of providing for the disposal of the region's low-level radioactive waste." *Id.*

---

participate in the sanctions hearing that the Commission voluntarily provided.

At a minimum, any review of the Commission's determination of breach should be highly deferential, akin to the deference awarded to agency adjudications or arbitral awards.

North Carolina claims that this Court "rejected the administrative agency model in *Texas* v. *New Mexico* ... where the Compact did not make the commission the exclusive forum for resolving disputes among members." Def. Reply 29-30. But this determination was the direct result of the relevant compact's language. As in *Texas* v. *New Mexico*, "[t]he question for decision" here "is what role the [compact] leaves to this Court. ... If it were clear that the [compact] was intended to be the exclusive forum for disputes between the States, then [this Court] would withdraw." 462 U.S. at 568-69. The Southeast Compact explicitly provides that the Commission is "*the judge* of ... [the party States'] compliance with the conditions and requirements of this compact." Art. 7(C) (emphasis added). In at least one other context, this Court has cited nearly identical language in concluding that it was obligated to defer to the decision of another branch of government. See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 804 (1995) (holding that Article I, Section 5, Clause 1, which provides that "'[e]ach House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members,'" gives Congress "the final say") (emphasis added).

North Carolina argues that *Old Town Trolley Tours of Washington, Inc.* v. *Washington Metropolitan Area Transit Commission*, 129 F.3d 201 (D.C. Cir. 1997), holding that arbitrary-and-capricious review is applicable to the review of a decision by an interstate compact commission, is inapt because the commission in that case "was not simultaneously asserting and

adjudicating its own monetary claim." Def. Reply 31-32. Nothing in the analysis supports this distinction. And, in any event, federal agencies routinely adjudicate enforcement actions that they bring against defendants, decisions which are then given deference by federal courts. See, *e.g.*, *Grid Radio* v. *FCC*, 278 F.3d 1314, 1317-18, 1322 (D.C. Cir. 2002) (upholding, under deferential standard, fine brought by FCC, adjudicated by FCC ALJ, and upheld by the FCC). If the Commission is not deemed the exclusive judge of breach as the Compact provides, at the very least, this Court should apply *Old Town Trolley*'s arbitrary-and-capricious standard. See 129 F.3d at 205.

Finally, North Carolina argues that the Commission is not entitled to the deference awarded to arbitral awards because the Commission was biased. Def. Reply 33. For support, North Carolina points only to the Commission's breach determination. That is hardly proof of bias; North Carolina, in effect, has admitted that it breached the Compact. See *infra* at 19.

Regardless, North Carolina freely entered into the Compact, which established the Commission as the adjudicator of breach. Given this, any institutional interests held by the Commission do not preclude this Court from enforcing the Commission's breach determination. See, *e.g.*, *Sheet Metal Workers Int'l Ass'n* v. *Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (refusing to vacate an arbitration award against an employer claiming bias where the employer consented to the arbitrator-selection procedures in its contract); *Garfield & Co.* v. *Wiest*, 432 F.2d 849, 853 (2d Cir. 1970) (plaintiff waived any objection to the arbitration panels because "[t]he selection of the arbitration panels was known to [the

plaintiff], and it most certainly knew" of the claimed bias).

This Court should enforce the terms of the Compact and affirm the Commission's determination that North Carolina breached the Compact or, at the very least, grant that determination substantial deference.

B. North Carolina Breached The Compact.

1. Breach By Non-Performance And Repudiation.

North Carolina does not dispute that the Compact required it to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type [was] filed with and issued by the appropriate authority." Art. 5(C); see Def. Reply 45. And, North Carolina admits that it took no steps to "seek a license" after December 1997. Def. Reply 58 n.14; see also North Carolina Admissions ¶ 11. Instead, upon learning that the Plaintiffs would provide no funds beyond the $80 million already authorized, unless North Carolina sought additional funding, North Carolina informed the Commission that it would "commence the orderly shutdown of the project." Dec. 19, 1997, Corgan letter to Hodes (App. 319). Whatever the scope of North Carolina's duty to take "appropriate steps" to secure a license, it was breached when North Carolina did *nothing*.

North Carolina, however, argues that the term "appropriate" is ambiguous. Def. Reply 53-54. Whatever ambiguity the term may have in the abstract or in the contexts cited by North Carolina, its meaning as used in the Southeast Compact, which deals with the disposal of low-level radioactive waste, is clear. When parties contract to undertake an activity in a heavily regulated industry such as nuclear waste, the "appropriate steps" are those taken pursuant to the

regulations established for that activity. Thus, the Atomic Energy Act of 1954, the Low-Level Radioactive Waste Policy Amendments Act of 1985, and the regulations promulgated by the Nuclear Regulatory Commission – which lay out the necessary (and thus appropriate) steps to license a waste facility – give meaning to the term "appropriate steps." North Carolina took such steps until it repudiated its obligations under the Compact. See Pl. Exceptions 32-33.

North Carolina denies that the relevant regulatory framework, referred to throughout the Compact, serves as a guide to the proper meaning of the term "appropriate steps." See Def. Reply 54 n.12. Although this regulatory regime does not use the precise term "appropriate steps," it does designate the steps which are appropriate in this setting. See 10 C.F.R. § 61.10; *id.* §§ 61.11-.16 (NRC regulations detailing the steps necessary to license and construct a low-level radioactive waste facility); cf. *Commercial Ins. Co. of Newark, N.J.* v. *Gonzalez*, 512 F.2d 1307, 1310 (1st Cir. 1975) ("[W]hen parties contract with reference to an industry whose terms are defined by an active supervising agency ... , it is to be assumed in the absence of evidence to the contrary, that they have that terminology in mind."). Yet, North Carolina admits that it did not take these – or *any* – steps toward licensing a facility after December of 1997. See North Carolina Admissions ¶ 11.

North Carolina also claims, without citation to the record, that it took appropriate steps when it "tr[ied] to negotiate different financial assistance measures." Def. Reply 53. The record reveals that all the negotiating effort was on the other side. A group of regional waste generators, in response to recommendations from a task force organized by the Commission that

included representatives from North Carolina, developed a draft MOU that attempted to address North Carolina's funding problems. Undisputed Facts ¶¶ 48, 52. The MOU proposed that the Commission expend the remainder of its available funds, approximately $20 million, and that the generators loan North Carolina $7 million. Draft MOU 3 (App. 294). This proposal was transmitted to North Carolina in August 1997, but, instead of endorsing the MOU or proposing an alternative, as the Commission required, North Carolina repudiated its Compact obligations in December 1997. See Undisputed Facts ¶¶ 52-54.

Nothing in the record indicates that North Carolina did anything to secure the necessary funding to complete its disposal facility. In fact, Governor Hunt informed the Commission that he would not request the appropriation of the necessary funds. See Apr. 8, 1996 Hunt letter to Hodes (App. 224).

North Carolina next attempts to define the term "appropriate steps" with reference to the Commission's 1988 resolution, which stated that it was "necessary and appropriate" to establish a Host State Assistance Fund. Def. Reply 46-52. The Commission's willingness to assist North Carolina did not relieve North Carolina of its independent contractual duty to provide the resources for and take appropriate steps toward licensing a facility.

The Commission repeatedly conveyed this position to North Carolina over the years. See, *e.g.*, Resolution, Feb. 9, 1988 ("[T]he Commission, *although not obligated to do so under the Compact*," provides this funding to North Carolina.) (emphasis added); Jan. 5, 1996 Hodes letter to Hunt (Joint Supp. Fact. Br. App. 3) ("[a]t some point, Commission funds will no longer be available to North Carolina ... , and North Caro-

lina will need to make alternative plans"). And throughout North Carolina's membership in the Compact, it understood that the Commission had no obligation to provide funding to the State. See, *e.g.*, Mar. 28, 1988, Martin letter to Hodes (App. 69) ("[T]he [North Carolina] Authority is responsible for the siting, *financing*, building, ... operating, ... and closing this regional facility.") (emphasis added); MacMillan, Executive Director of North Carolina Low-level Radioactive Waste Management Authority, Dep. Tr. at 40:13-:17 (App. 470) ("I knew that at any time [the Commission] could say no [to North Carolina's funding requests]."). And, on this point, the Compact is clear: "The Commission is not responsible for any costs associated with ... the creation of any facility." Art. 4(K)(1).

North Carolina's claim that the parties' course of performance demonstrates that the Commission was obligated to continue providing funding is wrong. Imposing such an obligation would directly contradict an express term of the Compact, which would violate basic contract law. See 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 31:4, at 274-78 (4th ed. 1999); see also *Cooper Distrib. Co.* v. *Amana Refrigeration, Inc.*, 63 F.3d 262, 279 (3d Cir. 1995) (Alito, J.) ("While extrinsic evidence, such as the course of performance evidence ... may be admissible to supplement or explain the terms of the agreement, *it cannot be used to contradict unambiguous terms.*") (emphasis added). This is particularly true here, because the Commission and North Carolina repeatedly stated their understanding that the Commission had no funding obligations with respect to North Carolina's facility.

North Carolina says that the Compact's express statement that the Commission has no funding obli-

gation "misses the point," because it "says nothing about whether the parties believed it would be 'appropriate' for North Carolina to fund the process *without* the Commission's *voluntary* assistance." Def. Reply 54 (second emphasis added).[6] The absence of a Commission obligation does not stand in isolation; all States understood that each state in turn would fund its own facility and recoup its costs once that facility was open. See, *e.g.*, N.C. Gen. Stat. § 104G-4 (App. 34). Plainly, it was not "appropriate" for North Carolina to make Commission funding a condition of fulfilling its obligations.

As the Compact and the record make explicit, the Commission's payments were voluntary and thus did not create a "course of performance" that *required* the Commission to continue funding North Carolina.

North Carolina independently breached the Compact by repudiating its Compact obligations. It did so when it stated in December of 1997 that, unless the Commission reversed its position on the provision of funds, North Carolina would "commence the orderly shutdown of the project." See Dec. 19, 1997, Corgan letter to Hodes (App. 319). A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Restatement (Second) of Contracts* § 250(a) (1981). Moreover, "language that ... amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation." *Id.*

---

[6] North Carolina says it was not required to take appropriate steps without outside financial assistance. *See, e.g.*, Def. Reply 46. By outside financial assistance, North Carolina actually means Commission assistance: it rejected the other outside assistance offered to it (the MOU). This contention contravenes the Compact. *See* Art. 4(K).

§ 250, cmt. *b*. When North Carolina made clear that it would not continue performance except under conditions contrary to the Compact's text, North Carolina repudiated the Compact as a matter of law.

North Carolina's argument that it took "appropriate steps" after December of 1997 can be reduced to a single point: "North Carolina ... 'continued to fund the Authority for almost two more years in the hope that alternative funding could be secured.'" Def. Reply 57 (quoting Second Report 27). Hoping for additional funding, while taking no action to secure that funding, does not fulfill a host State's obligation to take "appropriate steps" toward the licensing of a facility. In fact, North Carolina repudiated the Compact when it stated and followed through on its intent to cease performance.[7]

2. Breach By Bad-Faith Withdrawal.

North Carolina denies the existence of an implied covenant of good faith and fair dealing with respect to the Compact and, indeed, interstate compacts generally. Nothing in our federal system or in doctrines of judicial restraint, see *id.* 39-41, is offended by applying the established contract-interpretation doctrine of good faith and fair dealing to contracts among states. North Carolina cites no case law supporting its contention that the doctrine does not apply to interstate compacts. The law is to the contrary.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Restatement (Second) of Contracts*

---

[7] The fact that North Carolina could have withdrawn from the Compact when it repudiated is of no legal significance. It did not withdraw until after its December 1997 cessation and repudiation.

§ 205. And, the federal common law of contracts applies to interstate compacts. *E.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 10-14 (2001); *Bebee* v. *Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1288-90 (D.C. Cir. 1997). In fact, even when a governmental entity is a party to a contract, the contract contains an implied covenant of good faith and fair dealing. See, *e.g.*, *Ebasco Servs., Inc.* v. *United States*, 37 Fed. Cl. 370, 382 (1997) ("Every government contract contains an implied covenant of good faith and fair dealing."). Thus, North Carolina had a duty to act in good faith under the Compact.

North Carolina's contention that the Southeast Compact contains no language requiring parties to act in good faith, see Def. Reply 36-38, is beside the point. Likewise irrelevant is North Carolina's review of other low-level radioactive waste compacts enacted at the same time as the Southeast Compact. See *id.* 38-39. This duty is *implied* in all contracts. And the fact that other compacts restrict their party States' ability to withdraw does not eliminate the existence of an implied duty of good faith and fair dealing with respect to the terms of the Southeast Compact (or any of these other compacts).[8]

Applying the doctrine here, North Carolina withdrew from the Compact in bad faith as a matter of law. North Carolina accepted and actively invited assistance from the Commission over 11 years. Then, when North Carolina learned that it could no longer

---

[8] The rule is the opposite. A party seeking to exclude the covenant of good faith and fair dealing from a contract must cite express language to that effect, *see, e.g.*, *Chem. Bank* v. *Paul*, 614 N.E.2d 436, 442 (Ill. App. Ct. 1993), if such a provision is effective, *see Aventis Envtl. Sci. USA LP* v. *Scotts Co.*, 383 F. Supp 2d 488, 508-09 (S.D.N.Y. 2005) (UCC prohibits parties from disclaiming the implied duty of good faith).

coerce money from the Commission, North Carolina refused to perform on the untenable ground that its duty to perform was thereby discharged – despite the unambiguous Compact language stating that the Commission is not responsible for funding the creation of a host State's regional facility.[9]

Finally, with a sanctions complaint pending, North Carolina precipitously withdrew from the Compact in an effort to escape accountability. North Carolina's conduct falls squarely within the definition of bad faith. See *Restatement (Second) of Contracts* § 205, cmt. *d* (bad faith includes "evasion of the spirit of the bargain" and "lack of diligence," "even though the actor believes his conduct to be justified").[10]

The Commission, in its authorized role as "judge" of the parties' "compliance with the conditions and requirements of this compact." properly determined that North Carolina breached its Compact obligations. But even if it had not, North Carolina plainly breached by non-performance, repudiated the Compact, and then withdrew in bad faith. This Court should hold North Carolina liable for this conduct.

III. THE PLAINTIFFS ARE ENTITLED TO RESTITUTION.

North Carolina makes two arguments that Plaintiffs are not currently entitled to restitution.

---

[9] Here, Plaintiffs focus on North Carolina's bad faith withdrawal but do not waive their argument that North Carolina breached its covenant of good faith during the eleven-year process prior to withdrawal.

[10] North Carolina finds it significant that Plaintiffs do not discuss Article 7(H). Article 7(H), however, would have taken effect only if North Carolina met its Compact duties and constructed the second host state facility.

First, North Carolina argues that *even if* this Court determines that North Carolina breached the Compact, Plaintiffs' restitution claim would not be ripe. Def. Reply 59. "For every breach of contract, irrespective of its size or kind, the law will give an *immediate* remedy." 9 Arthur Linton Corbin, *Corbin on Contracts*, § 946, at 717 (Interim ed. 2002) (emphasis added). North Carolina's substantial breach and repudiation make restitution the appropriate remedy now. See *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 614 (2000) ("[C]ontract law entitles a contracting party to restitution if the other party 'substantially' breached a contract or communicated its intent to do so.").

Indeed, North Carolina's repudiation of the Compact by itself makes the claim of restitution ripe. "[W]hen one party to a contract repudiates that contract, the other party 'is entitled to restitution for any benefit that he has conferred on' the repudiating party 'by way of part performance or reliance.'" *Id.* at 608 (quoting *Restatement (Second) of Contracts* § 373); accord 12 Corbin, *supra*, § 1104, at 13 ("In the case of a repudiation there is no doubt that the injured party [may obtain] restitution of such value as he may have already conferred upon the repudiator.").

Second, North Carolina argues that the party States are not entitled to restitution because only the Commission provided money to North Carolina. This assertion is incorrect for several reasons, including a Compact provision that makes clear that this money is the contribution of the party States[11] and the fact

---

[11] The Compact expressly states that "the total" amount of all "fees or surcharges" levied on "all users of [the regional disposal] facility" "represents the financial commitments of all party

that the Commission is the agent of the party States and collected and held funds and conveyed funds to North Carolina as those States' authorized agent. See Pls. Reply 10-18. North Carolina continues to argue that the Commission is not the States' agent because it "was a separate legal entity acting on its own behalf." Def. Reply 60. As explained previously, this argument is unavailing. Pls. Reply 14-15. By law an agent is always a legal entity separate and distinct from the principal. *Restatement (Third) of Agency* § 1.01, cmt. *c* (2006) ("Despite their agency relationship, a principal and an agent retain separate legal personalities."). In sum, the Commission acted as the party States' agent in providing funds to North Carolina.

For this reason, among others, the Plaintiffs are entitled to restitution of the $80 million they conveyed, in what has turned out to be misplaced good faith, to North Carolina.

---

states." Art. 4(H)(2) & (2)(b). All funds the Commission collected were raised by levying fees against entities that used the regional facility.

CONCLUSION

This Court should adopt Plaintiffs' exceptions and enforce the sanctions order or, in the alternative, order North Carolina to pay full restitution.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
Alabama State House
11 South Union Street
Third Floor
Montgomery, AL 36130
(334) 242-7300

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
KRISTIN GRAHAM KOEHLER
HL ROGERS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

BILL MCCOLLUM
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

ROBERT E. COOPER JR.
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-3491

WILLIAM C. MIMS
ATTORNEY GENERAL
OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2071

HENRY W. JONES JR.
JORDAN PRICE WALL GRAY
JONES & CARLTON
P.O. Box 10669
Raleigh, NC 27605
(919) 828-2501

Counsel for Plaintiffs

* Counsel of Record

September 9, 2009